

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MERLE E. LONG)	
Claimant)	
VS.)	
)	
ENVISION, INC.)	
Respondent)	Docket No. 1,059,008
AND)	
)	
ACCIDENT FUND NATIONAL INSURANCE)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the May 17, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Paul V. Dugan, Jr., of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 14, 2013, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges that he slipped and fell at work on October 6, 2011, hitting his head on a metal bar and getting a splinter in the right knee. Claimant asserts that a few days after the accident, the splinter caused his right knee to become infected and swollen, which in turn caused him to fall at home on November 19, 2011. Claimant went to the hospital on November 20, 2011, and underwent surgery to repair a right femoral neck fracture. In closing arguments to the ALJ at the preliminary hearing, claimant's attorney argued:

So the claimant's position would be that he suffered the initial injury on October 6, 2011, continued to suffer reinjuries *[sic]* and a steady progression of that injury throughout his continued work for the next month and a half until the point that it got

to where the pain was so significant that he had to seek medical treatment and ultimately surgery.¹

Respondent admits claimant sustained a work-related head injury by accident on October 6, 2011, that arose out of and in the course of his employment. Respondent also admits claimant got a splinter in his right knee, that the right knee became infected and swollen and that claimant required medical treatment. However, respondent denies the splinter entered claimant's right knee during the fall on October 6, 2011, or that claimant's right knee injury was work related.

In his Order, ALJ Klein found:

The court makes the following preliminary findings. The claimant sustained a personal injury by accident, arising out of and in the course of his employment on October 6, 2011. The court finds that as a result of that accident, the claimant got a splinter in his knee that became infected. The court further finds that the infection caused the fall at home on November 19, 2011. Therefore, the court finds that the head injury, and the infection from the fall on October 6, 2011 are compensable injuries. What the court is not clear about, in spite of the opinion letter from Dr. Koehn, is whether or not the claimant's second fall on November 19th 2011 is the prevailing factor in the claimant's need for surgery from Dr. Pollock.

The court requests an IME from Dr. Hufford for a determination of whether or not either of claimant's falls, the October 6th or November 19th 2011 as a result of his infection is the prevailing factor in claimant's need for hip surgery. Parties may prepare a joint letter to assist Dr. Hufford. Following a report from Dr. Hufford, parties are to schedule a conference to address the other issues in the case.²

The issue before the Board is: did claimant sustain a right knee injury by accident arising out of and in the course of his employment with respondent? Specifically, was claimant's October 6, 2011, fall the prevailing factor causing his right knee injury and need for medical treatment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant testified that on October 6, 2011, while operating a machine he slipped and fell on a platform upon which he was standing. Claimant testified that he is totally blind and was being trained to operate the machine. Claimant indicated his knees struck first

¹ P.H. Trans. at 70-71.

² ALJ Order at 2.

and then his head hit a metal bar, causing his head to split open. According to claimant, the platform had debris on it. Claimant acknowledged that the platform was metal, but testified wooden pallets loaded with rolls of plastic or used to stack boxes were often placed on the platform. Immediately after the accident, claimant mainly had head pain.

After falling, claimant went to the office of his supervisor, Araugo "Manny" Tosses, where the head wound was bandaged by Mr. Tosses. Claimant testified that some of the debris from the platform stuck to his pants when he fell and he wiped it off when he went into Mr. Tosses' office. Claimant testified he noticed no rips or tears in his pants. Claimant finished his shift, but no longer operated the machine. He returned to work the next day, which was Friday.

When claimant returned to work the following Monday, October 10, 2011, his right knee had become swollen and painful and he brought it to the attention of Mr. Tosses. Claimant pulled up his right pant leg and Mr. Tosses discovered a scab on the right knee. Mr. Tosses removed the scab and on the back of the scab was a piece of wood debris. Claimant did not know he had a splinter until Mr. Tosses pulled off the scab. Claimant completed his shift on October 10, but his knee swelled a great deal and had substantial drainage. He testified that from October 6 through 10, he did not have any falls at home.

Early the next morning, claimant went to the emergency room, where he underwent x-rays and was prescribed antibiotics. According to claimant, emergency personnel thought the splinter, which claimant described as a wood chip, had gone into his leg and caused an infection. Claimant testified he reported to emergency personnel of having pain from the right knee up to the hip and that it was hard to walk. Claimant returned to work where he performed his normal job duties. According to claimant, while he was at work, his bandages would be changed by Mr. Tosses two or three times during a shift.

On October 22, 2011, claimant returned to the emergency room because his right leg was getting worse. Claimant had pain from the right knee along the inner thigh into the groin. He testified that additional x-rays were taken and fluid was taken from his right knee to determine if the infection had gotten into the fluid between the kneecap and joint. Claimant testified he asked if x-rays could be taken of his right hip, but the physician thought the source of the infection was the right knee, so no right hip x-rays were taken. Claimant again returned to work, but Mr. Tosses no longer asked claimant how he was doing, provided gauze or checked on claimant's right knee.

On November 10, 2011, claimant saw his personal physician, Dr. Norman Koehn, and complained of pain in the pelvic region and right thigh. Dr. Koehn ordered x-rays of claimant's right hip and upper right leg. Claimant continued to perform his regular job duties operating the machine. On November 16, 2011, claimant was feeding rolls into the machine, which required him to get on his knees and go under the machine. When claimant did that and got up, he had to sit down because he had difficulty moving.

Claimant's lead person went with claimant to Mr. Tosses' office, where claimant sat in a wheelchair until his shift ended.

Claimant called Dr. Koehn on November 17, 2011, for an appointment, but could not get in until the following week, so claimant went by ambulance to the emergency room. Claimant had pain in the inner thighs and upper legs, felt as if something was torn and was unable to stand. This time claimant did not return to work and began using a cane.

While at home on November 19, 2011, claimant attempted to get up using the cane when he felt a tearing sensation in his right leg. Claimant fell, but was able to turn so he fell on his buttocks. He testified that he had previously taken martial arts and performed a spiral move to sit down on the floor. The next day, claimant underwent right hip surgery by Dr. Pollock. Claimant indicated that he told Dr. Pollock of having right hip pain since October 2011, that was exacerbated by the November 19 fall. Claimant returned to part-time work on January 11, 2012, and full-time work on January 25, 2012. Claimant testified he recently began having sporadic pain in the right inner thigh, and he is experiencing burning in his thigh and pain by his right hip. At the preliminary hearing, claimant was requesting to see Dr. Pollock for further treatment.

Claimant testified that respondent never offered to send him to its company doctor.

Mr. Tosses testified that after claimant fell on October 6, 2011, he bandaged claimant's head, but observed no other injuries. Nor did claimant complain of a knee injury. According to Mr. Tosses, the platform upon which claimant fell was covered in rubber and he did not notice claimant being covered in wood chips. Mr. Tosses confirmed that he did not examine claimant's knee on that date and upon cross-examination, Mr. Tosses acknowledged he had no idea if claimant had a splinter in his knee on October 6. On October 10, claimant complained of right knee pain and Mr. Tosses looked at the knee and told claimant he should see a doctor. Claimant indicated he already had made arrangements to do so. Mr. Tosses then removed a splinter from claimant's right kneecap. For the next week, Mr. Tosses bandaged claimant's right knee once or twice a day.

Mr. Tosses indicated that as claimant's knee became worse, he asked claimant if he wanted to file a workers compensation claim or see respondent's workers compensation doctor. Claimant indicated he already had an appointment with a doctor, so the matter was never pursued.

Records from Via Christi Hospitals Wichita, Inc., reflect that claimant visited the emergency room on October 11, 22 and November 17, 2011. The October 11 records indicated claimant reported a right knee injury when he fell on wood which worsened despite home treatment and that his chief complaint was right knee pain. Notes from the October 22 visit indicated that claimant's chief complaint was pain from his swollen right knee to the groin and that it started from a splinter in the right knee. The diagnosis was right knee pain with a resolving abscess. Notes from the November 17 visit indicated that

claimant reported landing on his right knee on a platform on October 6, 2011. Claimant complained of right knee, thigh and hip pain. X-rays were taken of claimant's right hip/femur and the radiologist's notes indicated claimant likely had an old fracture in the past and had some arthritis in the right hip, but there were no acute findings.

On November 20, 2011, claimant was taken by ambulance to the St. Francis campus of Via Christi. Sedgwick County EMS records indicate claimant reported that at the beginning of October he had a fall at work, got a splinter in his knee that got infected and he went to the doctor who put him on antibiotics. The pain got better for a while, but recently had worsened. Claimant was walking with a cane the previous evening when his leg gave out and he twirled, falling and catching himself with his elbow. His leg twisted and he could feel tearing there and since then, his leg had hurt very badly when walking. A November 20, 2011, consultation report of Dr. Anthony G. Pollock indicated claimant had a right nondisplaced femoral neck fracture.

Claimant's attorney sent a letter to Dr. Koehn dated February 6, 2013, asking him to answer several questions yes or no. Dr. Koehn indicated: (1) claimant's right lower extremity injury, including the right femoral neck fracture, was causally related to the fall at work on October 6, 2011; (2) claimant's October 6, 2011, fall at work was the prevailing factor causing his right lower extremity injury, including the right femoral neck fracture; (3) while a significant exacerbation of claimant's pain occurred on November 19, 2011, neither the ordinary step forward with the assistance of a walker, nor the spiraling to the carpeted floor would be considered the prevailing factor causing claimant's right femoral neck fracture; and (4) the medical treatment provided by Dr. Pollock and the related charges were both necessary and reasonable for the treatment of claimant's right femoral neck fracture.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(f)(2)(B) states:

An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) provides:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant sustained a right knee injury on October 6, 2011. Claimant's testimony that he received the splinter during his fall is uncontroverted. His head was bleeding and his concerns were with that injury. The medical records from Via Christi indicate that claimant complained of a swollen right knee and that the source of claimant's right knee infection was the splinter. This Board Member finds claimant proved that he sustained a right knee injury by accident on October 6, 2011, arising out of and in the course of his employment with respondent.

Dr. Koehn's opinion that claimant's October 6, 2011, fall at work was the prevailing factor causing his right lower extremity injury is uncontroverted by any other medical provider. Little, if any, evidence was presented to show that claimant's right knee injury was caused by anything other than the fall at work. Accordingly, this Board Member finds that claimant's October 6, 2011, fall at work was the prevailing factor causing his right knee injury.

Neither party appealed that part of the preliminary hearing Order wherein the ALJ ordered claimant undergo an IME with Dr. Hufford. Therefore, this Board Member will not address that ruling.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁴

WHEREFORE, the undersigned Board Member affirms the May 17, 2013, preliminary hearing Order entered by ALJ Klein.

³ K.S.A. 2012 Supp. 44-534a.

⁴ K.S.A. 2012 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of August, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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Thomas Klein, Administrative Law Judge